Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-1396
No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,
v.
GREYHOUND COMPUTER CORPORATION,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF INTERNATIONAL BUSINESS MACHINES CORPORATION

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April 9, 1980

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REPLY BRIEF OF INTERNATIONAL BUSINESS MACHINES CORPORATION

In its petition, IBM stated that the trial of this case was set for May 1, 1980. Since filing the petition, IBM has learned, and wishes to advise the Court, that the trial judge has postponed trial of the case until February 3, 1981. The trial judge's order

is attached as an Appendix. The postponement was ordered because Greyhound's two primary witnesses on the damages issues are not yet prepared "to testify in any meaningful way." Appendix at 1a.

Though urging this Court to refuse a writ of certiorari, Greyhound does not dispute that the Ninth Circuit's decision, requiring a jury trial of this extraordinarily complex case, raises an issue critically important to the administration of justice in the federal courts. Moreover, respondent's discussion of *Ross v. Bernhard*, 396 U.S. 531 (1970), and its progeny only amplifies one of the reasons IBM believes this Court should review the decision below, namely, the confusion and disagreement about the standards to be applied in resolving the Seventh Amendment and Due Process questions raised by a jury demand in an extraordinarily complex case. Instead, respondent seeks to defeat review of the question presented in the petition by resorting to a number of technical quibbles, all of them without any real substance.

1. Greyhound urges that the legal issue presented by IBM's petition requires resolution of a factual issue not reached by the courts below. Greyhound's Brief in Opposition to Petition for Certiorari at 6-7. The premise for this argument is respondent's claim that the district court failed to find that the instant case is so complex as to exceed the practical abilities and limitations of a jury.

In so claiming, Greyhound misreads the clear import of the district court's ruling. That ruling was a response to the parties' opposing contentions as to both the degree of complexity of the case and the appropriate Seventh Amendment and Due Process

standards for deciding IBM's motion to strike the jury. The district court found that the case "is a complex case *by any definition*." IBM's Petition at 2a (emphasis supplied). The court further stated that the trial will require "a minimum of three months" and that there is a "very real danger of a hung jury and a third trial *or more*." *Id.* (emphasis supplied). The court then denied IBM's motion because it believed that under "the current status of the law," *id.*, it was without authority to strike the jury demand, not because it believed the case was within the practical abilities and limitations of a jury.[1]

The question certified by the district court thus was whether it had the authority to strike a jury demand in a case such as *Greyhound*. *See* IBM's Petition at 3a. As respondent apparently concedes, the Ninth Circuit answered that question in the negative, reaffirming its newly-announced rule in *U.S. Financial* that there is no "complexity exception" to the right to jury trial under the Seventh Amendment. Greyhound's Brief in Opposition at 4, 6. The question of law raised by the petition is, therefore, squarely presented to this Court.

2. Respondent's contention that the Court will not have a record before it sufficient to confirm the complexity of this case is also wrong. *See* Greyhound's Brief in Opposition at 6-7, 10; Greyhound's Brief in Opposition to Conditional Motion at 3. Upon the granting of a petition for certiorari, the clerk of this Court requests the record in the case from "the clerk

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[1] The court would not have reached the constitutional questions if it believed a jury would be able to understand the case. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947).

of the court possessed of" it. Rules of the Supreme Court 25(2). The court possessing the record most fully demonstrating the complexity of this case is the district court, which has the complete record of the first trial and the post-remand pretrial proceedings.[2] If the petition is granted, the clerk presumably would request the record from this court.[3] This record illuminates the district court's finding of extraordinary complexity in a lawsuit whose complexity is instructively different from *Gant v. Union Bank*, No. 79-1383. *See* IBM's Petition at 13-15.[4]

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[2] The record of the prior trial contains, for example, the opening statement to the jury by Greyhound's counsel:

> [T]his is such a complicated case to present—sometimes I wonder whether I understand the case, and I'm trying to present it to you on behalf of Greyhound . . . .

Transcript, vol. 1, at 13 (May 23, 1972), *Greyhound Computer Corp. v. IBM Corp.*, No. Civ. 72-242-PHX-WPC (D. Ariz.).

[3] Of course, if the Court deems it appropriate, it can direct the writ of certiorari to the district court pursuant to 28 U.S.C. § 1651(a). *See* IBM's Conditional Motion for Leave to File Petition and Petition for Writ of Certiorari at 4. IBM's conditional application for such a writ is not untimely under 28 U.S.C. § 2101(c), contrary to Greyhound's mistaken assertion. *See* Greyhound's Brief in Opposition to Conditional Motion at 3-4. There are no time limitations on applying for an extraordinary writ under section 1651(a). *See* Rules of the Supreme Court 31; R. Stern & E. Gressman, *Supreme Court Practice* 388 (5th ed. 1978). Even if section 2101(c) did govern IBM's conditional application, the time period under that section may be enlarged up to 150 days; here, IBM's petition was filed 125 days after the district court's decision.

[4] IBM's amicus brief in *Gant* answers Greyhound's claim that workable standards for identifying extraordinarily complex cases cannot be enunciated. *See* Motion of International Business Machines Corporation for Leave to File As Amicus Curiae In Support of Petition for Writ of Certiorari and Brief of Amicus Curiae at 14-16, *Gant v. Union Bank*, No. 79-1383.

3. Without citing any authority and without claiming any prejudice, *see United States v. L.D.T. Corp.*, 302 F. Supp. 990, 991 (E.D. Pa. 1969), Greyhound asserts that IBM has waived its right to contend that this case is too complicated for a jury. Greyhound's Brief in Opposition at 4-5. The basis for this assertion is that IBM waited until the re-trial of the case was near before moving to strike the jury, though a complaint demanding a jury trial had been outstanding for ten years. *Id.* at 2, 4-5.

The previous trial of this case took place in 1972 and ended in a directed verdict for IBM.[5] Greyhound's appeal was pending in the Ninth Circuit from 1972 to 1977, and IBM's petition for certiorari was denied by this Court in January of 1978. IBM moved in September of 1979 to strike Greyhound's jury demand under Fed. R. Civ. P. 39(a)(2). That Rule sets no time limits for such a motion. District courts have discretion to strike a jury demand at any time before trial, *id.*, and prefer to do so when the trial is approaching and the issues to be tried and the relief requested have been better defined. *See, e.g., General Investment Co. of Connecticut, Inc. v. Ackerman*, 37 F.R.D. 38, 40 (S.D.N.Y. 1964). In

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[5] *Greyhound v. IBM* was the first trial of the numerous private antitrust actions brought against IBM in the wake of the government's similar antitrust case. It was not until 1977 and 1978 that IBM had three protracted antitrust trials against it end with hung juries. *See* IBM's Petition at 5 n.3.

reaching the merits of IBM's motion, the district court was unswayed by Greyhound's waiver argument which, as here, was supported neither by a claim of prejudice nor by any authority.

Respectfully submitted,

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April 9, 1980

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

ORDER

Magistrate Gormley, after discussions with counsel, has determined that this case is not and cannot be readied for trial commencing May 6, 1980, as scheduled.

This Court has reviewed portions of the deposition of Fred E. Martin taken March 11, 1980, and R. H. Hunsberger taken March 12, 1980. These are plaintiff's primary witnesses on the essential question of damages claimed to have been suffered because of alleged acts of defendant. As to Mr. Martin, it is apparent that his work in many areas has not "progressed beyond the idea stage." He is not prepared at this time to give any meaningful testimony as to his opinion of damages or how he proposes to compute them. A reading of that deposition leaves the Court with the firm conviction that he has done nothing in this crucial area. Mr. Hunsberger appears to be only a short distance ahead of Mr. Martin in his calculations and study. He is also not prepared to testify in any meaningful way.

The Court would estimate that with diligent effort it will be 30-60 days or more before any meaningful examination of these witnesses can be had by defendant. Thereafter defendant will need time for its experts to examine plaintiff's damage estimates and opinions and the records upon which they are based. After that is done counsel for plaintiff will certainly desire to depose defendant's counter-experts. All of this should have been done long ago and must be done prior to preparation of the final pretrial order, pretrial conference and trial. Counsel for plaintiff has requested the earliest possible trial date.

IT IS ORDERED:

1. This Court's order filed herein on January 17, 1980, is quashed.

2. Trial herein scheduled to commence May 6, 1980, is vacated.

3. This case is placed on the Court's calendar of cases deferred for trial.

IT IS FURTHER ORDERED:

1. This case is referred to Magistrate Gormley for the following purposes, in addition to hearing and determining discovery disputes:

(a) Establish, in conference with chief counsel for each side, a realistic schedule for completing *all* pretrial discovery and determination of a final cut-off date.

(b) Establish a time for completion and lodging with the Magistrate a final pretrial order in compliance with Local Rule 42C.

(c) The holding of preliminary pretrial conferences and a final pretrial conference in accordance with Local Rule 42D.

(d) Schedule and procedure for marking exhibits to be offered at trial either directly into evidence or for identification only, as may be appropriate.

(e) Such other matters as may arise prior to the Magistrate's approval of the proposed pretrial order as he may be authorized by law or Local Rule to hear and determine or recommend such determination to the Court.

IT IS FURTHER ORDERED:

1. Jury trial herein is rescheduled to commence at 9:30 A.M., Tuesday, February 3, 1981.

2. Not later than thirty (30) days prior to trial counsel will

(a) Exchange and file with the Court requested jury voir dire questions.

(b) Exchange and lodge with the Court their then proposed jury instructions.

(c) Exchange and file with the Court trial briefs on issues of law as set forth in the pretrial order or otherwise likely to arise at trial.

DATED March 20, 1980.

/s/ Wm. P. Copple
United States District Judge

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